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In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1626

PEGGY BURTON,

Petitioner,

v.

CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES F. HINKLE
JERE M. WEBB
900 S. W. Fifth Avenue
Portland, Oregon 97204
Attorneys for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-75

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statute Involved	3
Statement of the Case	4
Reasons for Granting the Writ . .	8
Conclusion	17
Appendix:	
Opinion of the United States Court of Appeals for the Ninth Circuit	A 1
Order of the Court of Appeals Denying Rehearing	A 11
Opinion of the District Court for the District of Oregon	A 13
Transcript of District Court Ruling Re Plaintiff's Relief . .	A 18
Judgment Order of the District Court	A 19

THROUGH

INDEX OF AUTHORITIES

Cases Cited

	Page
Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973), aff'd 507 F.2d 611 (5th Cir. 1975)	10
Bradley v. Cothern, 384 F. Supp. 1216 (E.D. Tex. 1974)	11
Chase v. Fall Mountain Regional School District, 330 F. Supp. 388 (D. N.H. 1971)	12
Cole v. Choctaw County Board of Education, 471 F.2d 777 (5th Cir. 1973), cert. denied 411 U.S. 948 (1973)	11
Cooper v. Aaron, 358 U.S. 1 (1958)	10
Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973)	12
Fisher v. Snyder, 346 F. Supp. 396 (D. Neb. 1972), aff'd 476 F.2d 375 (8th Cir. 1973)	10
Gieringer v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973), cert. denied 414 U.S. 832 (1973)	10
Hanover Tp. Fed. of Teach. v. Hanover Commun. Sch. Corp., 318 F. Supp. 757 (N.D. Ind. 1970), aff'd 457 F.2d 456 (7th Cir. 972)	11

	Page
Jannetta v. Cole, 493 F.2d 1334 (4th Cir. 1974)	11
Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied 385 U.S. 1003 (1967)	10
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	13, 14, 15
Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973)	9
McGee v. Richmond Unified School District, 306 F. Supp. 1052 (N.D. Cal. 1969)	12
Palmer v. Thompson, 403 U.S. 217 (1971)	9
Perry v. Sindermann, 408 U.S. 593 (1972)	12, 13, 14, 15
Phelps Dodge Corp. v. National Labor Relations Bd., 313 U.S. 177 (1941)	12
Rolfe v. County Board of Education, 391 F.2d 77 (6th Cir. (1968)	10
Russo v. Central Sch. Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973)	11

ED THROUGH

	Page
Shelton v. Tucker, 364 U.S. 479 (1960)	13, 14, 15
Sterzing v. Fort Bend Ind. Sch. Dist., 496 F.2d 92 (5th Cir. 1974), vacating 376 F. Supp. 657 (S.D. Tex. 1972)	8
Watson v. City of Memphis, Tenn., 373 U.S. 526 (1963)	10
Wright v. State of Georgia, 373 U.S. 284 (1963)	10
Younger v. Harris, 401 U.S. 37 (1971)	15

Statutes

Ore. Rev. Stat. 342.530(1)(b) . . .	4, 5
42 U.S.C. §1983	3, 4, 16

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October Term, 1974

No. _____

PEGGY BURTON,

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v.

CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5,

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed January 13, 1975.

OPINIONS BELOW

The amended opinion of the Court of Appeals, dated March 28, 1975, is reported at 512 F.2d 850, and is set out in the Appendix, infra, p. A 1. A copy of the "Order" of the Court of Appeals dated March 28, 1975, denying petitioner's petition for a rehearing, is set out in the Appendix, infra, p. A 11.

The opinion of the District Court dated January 18, 1973 is reported at 353 F. Supp. 254, and is set out in the Appendix, infra, p. A 13. Pertinent portions of the oral ruling of the District Court regarding the relief to be granted are set out in the Appendix, infra, p. A 18. A copy of the "Judgment Order" dated March 2, 1973 is set out in the Appendix, infra, p. A 19.

JURISDICTION

The judgment of the Court of Appeals was entered in this case on

January 13, 1975. A petition for rehearing and for rehearing en banc was subsequently filed. That petition was denied, and an amended opinion filed, on March 28, 1975. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether a nontenured public high school teacher whose discharge during the school year was based on a statute declared to be unconstitutional is entitled to reinstatement.

STATUTE INVOLVED

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

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STATEMENT OF THE CASE

This action was brought under 42 U.S.C. §1983 by Peggy Burton, a public high school teacher, against her former employer, Cascade School District Union High School No. 5, and against the principal, superintendent, and members of the school board, individually and in their official capacities. Jurisdiction of the district court was invoked pursuant to 28 U.S.C. §1343. In essence, her complaint alleged that as a result of the combined acts of the defendants, she was improperly dismissed from her position during the term of her contract in violation of her civil rights.

In October 1971, plaintiff was in the second month of her second year as a teacher of biology and other subjects when the school principal learned from the mother of a former student that plaintiff was a homosexual. After she admitted that fact at a specially called school board meeting, the board discharged her pursuant to Ore. Rev. Stat. 342.530(1)(b), which at that time provided that teachers in districts like Cascade School District, where there was

no tenure system, could be dismissed for "immorality." Plaintiff had been evaluated as a "good" teacher by the defendants, and the defendants stipulated that her dismissal was not based on any dissatisfaction with her job performance. Defendants did not contend that adverse community reaction, or anything else, had impaired her effectiveness as a teacher.

After these facts were established (by means of defendants' answers to interrogatories, a stipulation entered into by the parties, and plaintiff's affidavit), plaintiff moved for summary judgment on the issue of defendants' liability. She asserted four bases for the motion: (1) that Ore. Rev. Stat. 342.530(1)(b), providing for dismissal of teachers on grounds of "immorality," was unconstitutionally vague; (2) that her discharge was unconstitutional because the statute did not require a rational nexus between her allegedly immoral conduct and her teaching performance; (3) that her discharge violated her equal protection rights,

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because defendants had shown no compelling governmental interest in discriminating against homosexuals as a class; and (4) that her discharge violated her constitutionally protected right of privacy, in that her wholly private sexual orientation and conduct could not legitimately be made a criterion for public employment.

The District Court granted plaintiff's motion on the grounds that the statute was unconstitutionally vague. The court also suggested that the statute might be unconstitutional because it did not require a nexus between her allegedly immoral conduct and her teaching performance. The court did not reach the other issues raised by plaintiff's motion.

Subsequently, the court held a hearing to determine the appropriate remedy for her unconstitutional discharge. Plaintiff requested reinstatement to her job, back pay, general damages, costs and attorneys' fees, and expungement from the school district's records of all references to her dismissal and the reasons therefor. The District Court granted every element of

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the requested relief except reinstatement. The only reason given by the court for denying reinstatement was that "It just wouldn't work out to reinstate this woman in this little area." (App., infra, p. A 18.) A "Judgment Order" setting out the District Court's decision was filed on March 6, 1973.

Plaintiff then appealed the denial of reinstatement to the Court of Appeals for the Ninth Circuit, and defendants filed a notice of cross-appeal from all of the remaining portions of the District Court's judgment order. Defendants did not prosecute their cross-appeal, and it was dismissed from the bench during oral argument on November 12, 1974. In a subsequent written opinion, the Court affirmed the District Court's decision that plaintiff was not entitled to reinstatement, with Judge Lumbard dissenting.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with applicable decisions of this Court and with decisions from other Circuits, and it establishes incorrect guidelines for the reinstatement of public employees who have been discharged for constitutionally impermissible reasons

In affirming the denial of reinstatement in this case, the Court of Appeals concluded that it was proper for the trial court to take into account the possible disruption or antagonism that might have resulted from plaintiff's reinstatement. (App., infra, p. A 4.) The court's approval of that factor as a criterion for measuring the propriety of reinstatement conflicts squarely with the decision of the Fifth Circuit in Sterzing v. Fort Bend Ind. Sch. Dist., 496 F.2d 92 (5th Cir. 1974). The trial court in that case had found that a nontenured teacher had been discharged for unconstitutional reasons, but declined to grant reinstatement on the grounds that to do so would create too many antagonisms in the school district. 376 F. Supp. 657 (S.D. Tex. 1972). On

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appeal, the Fifth Circuit specifically held that the presence of possible antagonism was an impermissible basis for refusing to order reinstatement where the vindication of constitutional rights was at stake. A similar ruling was made by the Eighth Circuit in Langford v. City of Texarkana, 478 F.2d 262 (8th Cir. 1973), where the Court, in considering the propriety of reinstating municipal employees in the face of possible antagonism on the part of fellow employees, specifically followed this Court's decisions that have "rejected the proposition that interference with constitutional rights can be justified on the grounds that the community is hostile to their exercise and vigorously displays its feelings." 478 F.2d at 267.

The Fifth and Eighth Circuits have thus followed, and the Court of Appeals in the present case declined to follow, the principle frequently reaffirmed by this Court that hostility on the part of third persons cannot constitute grounds for failing to vindicate a person's constitutional rights. Palmer v. Thompson, 403 U.S. 217, 226 (1971);

Cooper v. Aaron, 358 U.S. 1 (1958); Watson v. City of Memphis, Tenn., 373 U.S. 526, 535 (1963); Wright v. State of Georgia, 373 U.S. 284, 293 (1963).

Furthermore, the decision in this case denying reinstatement is in square conflict with decisions from several other circuits in which non-tenured public school teachers have been reinstated as a matter of right after having been discharged for constitutionally impermissible reasons. See, for example, Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973), aff'g 346 F. Supp. 396 (D. Neb. 1972); Gieringer v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973), cert. denied 414 U.S. 832 (1973); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966), cert. denied 385 U.S. 1003 (1967); Rolfe v. County Board of Education, 391 F.2d 77 (6th Cir. 1968), aff'g 282 F. Supp. 192 (E.D. Tenn. 1966). See also Andrews v. Drew Municipal Separate School District, 371 F. Supp. 27 (N.D. Miss. 1973), aff'd 507 F.2d 611 (5th Cir. 1975), in which a public school district was ordered to offer employment to certain teacher

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applicants who had previously been denied employment on unconstitutional grounds; Cole v. Choctaw County Board of Education, 471 F.2d 777 (5th Cir. 1973), cert. denied 411 U.S. 948 (1973), where immediate reinstatement was ordered for a nontenured school bus driver who had been discharged for constitutionally impermissible reasons; Russo v. Central Sch. Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied 411 U.S. 932 (1973), a decision in favor of a nontenured teacher which led to an order of reinstatement on remand, Civil No. 1970-427 (W.D. N.Y., filed Dec. 17, 1973); and Jannetta v. Cole, 493 F.2d 1334, 1338 (4th Cir. 1974), where, in a case involving a fireman, the court held flatly that "*** the remedy for constitutionally impermissible discharge from public employment is back pay and reinstatement."[1]

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1. In several reported District Court decisions, moreover, reinstatement has been routinely ordered for nontenured teachers who had not been rehired or who had been discharged for constitutionally impermissible reasons. See, for example, Bradley v. Cothern, 384 F. Supp. 1216 (E.D. Tex. 1974); Hanover Tp. Fed. of Teach. v. Hanover Commun. Sch. Corp.,

These decisions show that reinstatement is not, as the Court of Appeals here characterized it, an "extraordinary equitable remedy." (App., infra, p. A 5.) Indeed, this Court ruled long ago that "[r]einstatement is the conventional correction for discriminatory discharges," Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (emphasis added), and that rule must apply with equal force to discharges that are impermissible for constitutional, rather than statutory, reasons.

The decision below conflicts not only with Phelps Dodge, but also with more recent decisions of this Court defining the constitutional rights of nontenured teachers. In Perry v. Sindermann, 408 U.S. 593 (1972), this

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318 F. Supp. 757 (N.D. Ind. 1970), aff'd, 457 F.2d 456 (7th Cir. 1972); Chase v. Fall Mountain Regional School District, 330 F. Supp. 388 (D. N.H. 1971); McGee v. Richmond Unified School District, 306 F. Supp. 1052 (N.D. Cal. 1969). See also Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973), where a school district was ordered to offer employment to teacher applicants who had previously been denied employment on unconstitutional grounds.

Court commented that on two previous occasions, it had

> "*** specifically held that the nonrenewal of a non-tenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights. Shelton v. Tucker, [364 U.S. 479 (1960)]; Keyishian v. Board of Regents, [385 U.S. 589 (1967)]. We reaffirm those holdings here." 408 U.S. at 598.

In the present case, the District Court ruled that plaintiff's dismissal had been carried out pursuant to an unconstitutionally vague statute, and was therefore "invalid." (App., infra, p. A 20.) The Court of Appeals characterized plaintiff's discharge as an "unlawful dismissal pursuant to an unconstitutional statute" (App., infra, p. A 4), and recognized that the defendants "*** could not refuse to rehire [plaintiff] for a constitutionally impermissible reason ***," (App., infra, p. A 3, note 1), yet concluded that "*** the nature of the constitutional right sought to be vindicated is not such as to compel reinstatement ***." (App., infra, p. A 5, note 3.)

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This conclusion by the Court of Appeals is both illogical and erroneous, and it conflicts with Perry v. Sindermann, supra, and with the Shelton and Keyishian decisions cited therein. The latter decisions established that nontenured teachers cannot be denied reemployment because of their failure to comply with unconstitutionally vague or overbroad statutes. In Shelton, this Court condemned the "unlimited and indiscriminate sweep of the statute," 364 U.S. at 490, while in Keyishian it condemned the regulations in question because they were "wholly lacking in 'terms susceptible of objective measurement.'" 385 U.S. at 604. These are exactly the kinds of vices found in the statute involved in this case by the District Court, and the Shelton and Keyishian decisions show that a nontenured teacher's interest in being free from the arbitrary and capricious application of such statutes is no less deserving of a full measure of constitutional protection than the right of free speech or the right to be free from racial discrimination.

Taken together, Perry, Keyishian and Shelton demonstrate that "nonrenewal of a non-tenured teacher's one-year contract may not be predicated" on a statute that is void for vagueness. Since an injunction requiring a school board to rehire a teacher for a subsequent year is clearly the only adequate remedy in such a case, it should follow a fortiori that when a nontenured teacher has been dismissed in the middle of a school year for a constitutionally unacceptable reason, she is entitled to reinstatement to her teaching position. See Younger v. Harris, 401 U.S. 37, 47 note 4 (1971), where this Court noted that its prior decisions enjoining state officials from discharging employees on the basis of unconstitutionally vague statutes were predicated on the fact "*** that any plaintiff discharged for exercising his constitutional right *** would have had no adequate remedy at law ***." (Emphasis added.) If a public employee who is discharged because he fails to comply with an unconstitutionally vague statute (which

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is exactly the situation in this case), has "no adequate remedy at law," then clearly reinstatement is the only remedy that can undo the wrong that was done.

In summary, the decision below is squarely contrary to decisions from other circuits which have ordered reinstatement as the proper remedy for nontenured teachers who have been discharged for constitutionally impermissible reasons, and it is inconsistent with this Court's decisions in the area of nontenured teachers' substantive constitutional rights. The case is a significant one, for the decision below undermines the principle that any remedy for an unconstitutional discharge from public employment that does not include reinstatement is inadequate to vindicate the constitutional rights that are at stake and to protect the interests that §1983 is designed to serve.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

CHARLES F. HINKLE
JERE M. WEBB
900 SW Fifth Avenue
Portland, Oregon 97204

Attorneys for Petitioner

June 19, 1975

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PEGGY BURTON,
Plaintiff-Appellant,
vs.
CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL No. 5, et al.,
Defendant-Appellees.

No. 73-1568
AMENDED OPINION

[March 28, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: LUMBARD,* MERRILL and WRIGHT, Circuit Judges.

PER CURIAM:

This is an appeal by a non-tenured, homosexual schoolteacher from a district court order granting her damages and attorney fees for what was adjudged her wrongful dismissal, but refusing to reinstate her to her old position. We affirm.

Appellant Peggy Burton began to teach at Cascade High School in July 1970. She was in the second month of her second full year as a teacher of biology, earth sciences, ecology, consumer education, and business mathematics, and as supervisor and referee of girls' sports activities. The defendant Federico, the school principal, confronted her with information coming to him from the mother of a student that appellant was a homosexual. At a conference with Frederico and, again at an appearance before a special school board meeting, appellant acknowledged that she was a "practicing homosexual."

At the meeting on October 18, 1971, a resolution was adopted suspending Ms. Burton upon "recommendation of the administra-

*Senior Circuit Judge of the Second Circuit.

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tion based on her admitting to be a homosexual." Later, allegedly on advice of counsel, the board revised its October 18 resolution to read:

> Peggy Burton be dismissed and the contract terminated as a teacher in the district because of her immorality of being a practicing homosexual.

This was done in order that the dismissal might comply more closely with Ore. Rev. Stat. § 342.530(1)(b) (1971), which before its repeal in 1973 provided:

> Dismissal of teachers. (1) During the period of the contract . . . the district school board shall dismiss teachers only for:
>
> . . . .
>
> (b) Immorality;
>
> . . . .

Plaintiff initiated this action under 42 U.S.C. § 1983, seeking declaratory relief that defendants had violated her civil rights by their dismissal of her on account of her status as a practicing homosexual. She also sought damages and reinstatement to her teaching position. The district court sustained her claim that the dismissal was improper because section 342.530(1)(b), the statute upon which it was based, was unconstitutionally vague. However, the court limited its relief to an award of money damages amounting to the balance of her salary for the teaching year 1971-72, one-half of her salary for the following teaching year, and $750 for attorney fees and costs, along with an order that the school expunge from its board meeting records and personnel files all references to plaintiff's dismissal. The court refused to order reinstatement to the teaching position.

Plaintiff appealed the district court's refusal to order reinstatement, and defendants cross-appealed from the money judgments in plaintiff's favor. Heretofore, on November 13, 1974, we dismissed the cross-appeal for failure to file a brief within the time prescribed by rule, or at all.

This leaves only the question whether the district judge erred in refusing to order that the plaintiff be returned to her old position. In analyzing this question, we note that plaintiff had neither tenure, nor even sufficient seniority to qualify for consideration

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for a three-year contract after the school year ended, under *Ore. Rev. Stat.* § 342.508 (1971). Under Oregon law, her only "rights" respecting reemployment at the end of the 1971-72 school year, had the school board not wrongfully dismissed her during the period of her contract, would have been governed by *Ore. Rev. Stat.* § 342.513(1) (1974), which provides:

> 342.513 *Renewal or nonrenewal of contracts for following year.* (1) Each district school board shall give written notice by March 15 of each year to all teachers . . . in its employ who are not under tenure or who are not eligible for a three-year contract under ORS § 342.508 [of] the renewal or nonrenewal of the contract for the following school year. In case the district school board does not renew the contract, the material reason therefor shall, at the request of the teacher . . ., be spread upon the records of the school district and the board shall furnish a statement of the reason for nonrenewal to the teacher . . . . If any district school board fails to give such notice by March 15, the contract shall be considered renewed for the following school year at a salary not less than that being received at the time of renewal. . . .[1]

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[1]Judge Lumbard's dissenting opinion finds in the language of § 342.513 a judicially cognizable interest in reemployment, since "the statutory requirement that it provide reasons for nonrenewal precludes it from having completely unfettered discretion since the board could not give a constitutionally unacceptable reason." However, the Board could not refuse to rehire Ms. Burton for a constitutionally unacceptable reason even if it were allowed to do so by Oregon law.

Conversely, so long as nothing under the applicable Oregon statutes prevented the Board, acting in good faith, from refusing to rehire Ms. Burton for any constitutionally acceptable reason, any interest that she might have in renewal of her contract would be purely speculative. Her "adequacy" as a teacher would be no guarantee of retention. We said recently in *Burdeau v. Trustees*, 507 F.2d 770, 774 (9th Cir. 1974):

> "Appellant has pointed to nothing in the statutes, or in the Statewide rules, or in the regulations of the particular institution which state that if he meets certain standards his reemployment is guaranteed. Until tenure is obtained he may equal or exceed minimum requirements for evaluation and still the school may prefer to employ someone else for the position he seeks."

Slip op. at 6.

The trial judge correctly refused to speculate whether the Board would have ultimately refused to rehire appellant for some unconstitutional reason, had she not been prematurely dismissed.

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Appellant was awarded the full salary she would have received for that part of her contract following her unlawful dismissal pursuant to an unconstitutional statute. We cannot say that the district judge abused his broad equitable discretion in not also ordering that Ms. Burton be allowed to return to her teaching post for a period at least equivalent to the unserved portion of her contract.[2] The trial judge faced a difficult task of balancing the appellant's interest in completing her wrongfully terminated one-year contract against the disruption which he may have felt her reinstatement for a few months would inevitably cause to the school district, the school's staff, the student body, and the community in light of the long-standing nature of the controversy.[3]

Reinstatement of wrongfully dismissed teachers has occasionally been required, without consideration of whether or not they were

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[2]Of course, the granting or withholding of remedial relief is not wholly discretionary with the trial judge. *Cf. e.g., Union Tool Co. v. Wilson,* 259 U.S. 107, 111-12 (1922) (Brandeis, J.), "The private or public rights that the decree sought to protect are an important measure of the remedy." *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949).

Nevertheless, the trial judge is in the better position to determine whether a remedy will adequately protect a litigant's legally cognizable interests. *See* discussion in text *infra.* He is also better able to assess, in a case such as this, whether his determination that the statutory basis relied upon by the school board was constitutionally defective and demanded an award of damages to the wrongfully dismissed teacher, will be a sufficient deterrent to future board actions impairing the school district's contractual obligations.

[3]Appellant suggests that

> "[t]he district court may have made the not unreasonable assumption that some degree of personal antagonism inevitably exists where a person is discharged from his teaching assignment for reasons which are based, at bottom, on the prejudices of school officials.

(Br. of Appellant at 16.)

However, she argues that even assuming the correctness of the district court's conclusion that her return to the classroom "wouldn't work out," this still would not justify denying her reinstatement. She notes that similar antagonism would also exist whether the teacher is fired because she criticizes the school board, because she is black, or because her religious convictions offend the majority of the townspeople. *See Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 234 (1970) (Brennan, J., concurring in part and dissenting in part). Yet in such situations, some appellate courts have found that back pay may not obviate the defendants' obligation to reinstate plaintiff, for "[t]he right sought to be vindicated is not a contractual

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tenured. This extraordinary equitable remedy has commonly been imposed in factual situations involving racial discrimination, the special target of federal and state legislation (and of three constitutional amendments). *See, e.g., Franklin v. County School Board*, 360 F.2d 325, 327 (4th Cir. 1966) (where black teachers only were dismissed upon merger of two previously segregated schools, priority rehiring rights and damages were ordered due to the discriminatory pattern of the dismissals).

The other common factual situation in which reinstatement has been required involves the case in which dismissal appears to have been in reprisal for the legal exercise of free expression in a manner critical of the public employer. *See Pred v. Board of Public Instruction*, 415 F.2d 851 at 859 (5th Cir. 1969). *Cf. Stewart v. Pearce*, 484 F.2d 1031 (9th Cir. 1973).

However, even courts which have ordered reinstatement have nonetheless intimated that the appropriate remedy may be influenced by a careful weighing of all facts and circumstances.[4] On

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one, nor could it be since no right to reemployment existed. What is at stake is the vindication of constitutional rights. . . ." *Pred v. Board of Publ. Instruction*, 415 F.2d 851, 856 (5th Cir. 1969).

In this case, however, the nature of the constitutional right sought to be vindicated is not such as to compel reinstatement frequently ordered in response to racially motivated dismissals, or to those aimed at punishing the exercise of free speech.

Ms. Burton challenged the vagueness of the statute which was relied upon to justify her dismissal. The district court upheld her contention and ruled the statute unconstitutional. At the same time the court awarded damages in excess of the amount due on the unserved portion of her contract. As discussed in text, *infra*, the district judge did not abuse his discretion in finding that his order and award afforded both adequate relief for the appellant and adequate protection against subsequent attempts to dismiss teachers under provisions such as § 342.530(1)(b).

[4] *See Pred v. Board of Public Instruction, supra*, at 859:

> "For on the facts must rest the determination of whether the denial of a continuing contract was (a) a reprisal for these actions in expression of ideas, thoughts, or associations rather than permissible nondiscriminatory professional evaluations and, if so, (b) whether under the circumstances in relation to the reasonable demands of a system of organized responsible learning these actions were protected. On a finding of (a) and (b), the remedy (c) might well also depend on all of the facts."

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the facts presented in the case before us, we cannot say that an award limited to monetary damages was inadequate for a wrongful dismissal, under an unconstitutionally vague statute, of a nontenured teacher.

The common thread running through the cases in which reinstatement was directed after appellate review seems to be that such relief is necessary, not only to redress injury to the complainant but also to discourage school systems from taking similar action against other teachers in the future. As noted previously, we cannot say that plaintiff was denied adequate compensation for her claimed interests in finishing the school year. Nor can we say that the district judge erred in concluding impliedly that declaratory relief and damages would provide a sufficient deterrent to future board attempts to dismiss teachers serving annual appointments on the basis of "immorality."

Our holding is not inconsistent with *Board of Regents v. Roth*, 408 U.S. 564 (1972). There, the Supreme Court suggested that a refusal to rehire a nontenured teacher on the basis of "immorality" would at least require a hearing at which the teacher had an opportunity to refute this charge which might stigmatize his reputation in the community. Here, Ms. Burton was given a hearing at which she freely admitted her homosexuality, and the district court repudiated the school board's attempt to justify its dismissal of her by characterizing this condition as "immoral." The basis for any possible stigma has been eliminated.[5]

Appellant was granted full pay for the loss resulting from the wrongful termination of her one-year contract. And although the parties have stipulated that Ms. Burton was an "adequate teacher,"

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[5]*See* Burdeau v. Trustees, 507 F.2d 770, 773 (9th Cir. 1974).

We do not address the question whether the school district could refuse to rehire appellant, or whether any other school system could refuse to give her a teaching position, solely on the basis of her homosexual inclinations. *Compare McKeand v. Laird*, 490 F.2d 1262, 1265 (9th Cir. 1973) (dictum) *and Andrews v. Drew Municipal Separate Sch. Dist.*, 371 F. Supp. 27 (N.D. Miss. 1973) *with Wentworth v. Schlesinger*, 490 F.2d 740, 754 (D.C. Cir. 1973), *and Safransky v. State Personnel Bd.*, 215 N.W.2d 379 (Wis. Sup. Ct. 1974). *See also Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972). *But see Pettit v. State Board of Education*, 10 Cal.3d 29, 36 n.7, 513 P.2d 889, 894 n.7, 109 Cal. Rptr. 665, 670 n.7 (1973).

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we cannot say that her chances of reemployment were such as to warrant our finding the same type of "property interest" in reemployment which might require reinstatement of a tenured teacher, or one under longer-term contract with the district.[6] We hold only that, given the speculative nature of any expectation of reemployment appellant may have had,[7] the district judge's award of an additional half-year's salary (above and beyond the back pay award for the unserved portion of her original contract) seems generous, and well within the lower bounds of his remedial discretion.

The judgment of the district court is affirmed.

LUMBARD, Circuit Judge (dissenting):

I dissent regarding the relief to which Ms. Burton is entitled.

Reinstatement is the appropriate remedy for an individual who has been removed from her job in violation of the Constitution. Most courts have not treated reinstatement as an "extraordinary equitable remedy." In fact, they have ordered reinstatement as a matter of course, even in cases involving non-tenured teachers. See, e.g., Gieringer v. Central School District No. 58, 477 F.2d 1164 (8th Cir.) (reversing unpublished district court decision), cert. denied, 414 U.S. 1001 (1973); Fisher v. Snyder, 475 F.2d 375 (8th Cir. 1973), affg. 346 F. Supp. 396 (D.Neb. 1972); Rolfe v. County Board of Educ., 391 F.2d 77 (6th Cir. 1968), affg. 282 F. Supp. 192 (E.D. Tenn. 1966); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966) (en banc) (reversing 242 F. Supp. 721 (E.D. N.Car. 1965)), cert. denied, 385 U.S. 1003 (1967); Chase v. Fall Mountain Regional School Dist., 330 F. Supp. 388 (D.N.H. 1971); Hanover Twp. Fedn. of Teachers v. Hanover Community School Corp., 318 F. Supp. 757 (N.D. Ind. 1970), affd., 457 F.2d 456 (7th Cir. 1972); McGee v. Richmond Unified School Dist., 306 F. Supp. 1052 (N.D. Cal. 1969). Cf. Doherty v. Wilson, 356 F. Supp. 35 (M.D. Ga. 1973).

The majority seems to rely on three arguments to uphold the district court's refusal to reinstate Ms. Burton. First, it emphasizes her lack of tenure which meant that she had no right to a renewal

[6] *Cf. Jablon v. Trustees,* 482 F.2d 997 (9th Cir. 1973).

[7] *See* note 1 *supra.*

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of her teaching contract. This fact alone certainly does not preclude reinstatement, as the cases cited above amply demonstrate. Moreover, Ms. Burton did have some rights under her contract with the school system. Unlike the teacher in Board of Regents v. Roth, 408 U.S. 564 (1972), in which the Supreme Court held that a hearing was not required when a school system decided not to renew a non-tenured teacher's contract, Ms. Burton had the right under Oregon law to demand written reasons for nonrenewal of her contract. Ore. Rev. Stat. § 342.513(1) (1974). While the school board would have wide discretion in deciding whether to renew Ms. Burton's contract, the statutory requirement that it provide reasons for non-renewal precludes it from having completely unfettered discretion since the board could not give a constitutionally unacceptable reason. E.G., Perry v. Sinderman, 408 U.S. 593, 598 (1972) ("[T]he nonrenewal of a nontenured public school teacher's one-year contract may not be predicated on his exercise of First and Fourteenth Amendment rights."); Board of Regents v. Roth, supra, at 573-74 (certain procedural safeguards are required if state action imposes a "stigma or other disability that foreclose[s] . . . freedom to take advantage of other employment opportunities" or puts a "person's good name, reputation, honor, or integrity" at stake). Thus it is inaccurate to say that Ms. Burton had no rights beyond the one-year term of her contract. But even if she had no rights, that does not mean that reinstatement is inappropriate; courts have often reinstated non-tenured teachers.[1]

Second, the majority contends that it was permissible perhaps even appropriate, for the district judge to balance plaintiff's interest in the vindication of her constitutional rights against the disruption and antagonism her reinstatement would cause.[2] I dis-

[1]The fact that Ms. Burton was discharged pursuant to an unconstitutional statute and was not discriminated against on racial grounds or was not fired for exercising her First Amendment rights does not mean that she is entitled to a lesser sort of remedy than would be available in racial discrimination or First Amendment cases. All violations of constitutional rights should receive adequate redress, which in this case requires reinstatement.

[2]The court assumes that there would be disruption and antagonism, but there is no evidence that this would be so. On the contrary, statements made by appellant's counsel at argument indicate that this would not be so as to the student body.

agree. It is clearly inappropriate to consider community resentment in deciding whether to reinstate a person to a position from which she was unconstitutionally removed. Sterzing v. Fort Bend Independent School Dist., 496 F.2d 92, 93 (5th Cir. 1974) (per curiam) ("Enforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation."); Langford v. City of Texarkana, 478 F.2d 262, 267-68 (8th Cir. 1973). If community resentment was a legitimate factor to consider, few Southern school districts would have been integrated. One of the major purposes of the Constitution is to protect individuals from the tyranny of the majority. That purpose would be completely subverted if we allowed the feelings of the majority to determine the remedies available to a member of a minority group who has been the victim of unconstitutional actions.[3]

Finally, the majority asserts that the monetary award given to Ms. Burton by the district court is adequate. Once again I disagree. It is questionable whether a monetary award is sufficient to deter the school board from taking similar unconstitutional action in the future. After all, what the board wanted was to be rid of Ms. Burton and the district court judgment allows it to accomplish that. If a similar situation arises in the future it might well conclude that it would be willing to pay a few thousand dollars in order to be rid of an unwanted teacher.

However, the real issue is not whether the remedy imposed here will deter the school board from taking similar action in the future. The real issue is how best to vindicate Ms. Burton's rights. She had a contract to teach for one year. The only way to restore to her what she lost is to require the school board to reinstate her as a teacher for one year. As the Fifth Circuit noted

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[3]The case cited by the majority for the proposition that all circumstances should be weighed to determine whether reinstatement is appropriate, Pred v. Board of Public Instruction, 415 F.2d 851, 859 (5th Cir. 1969), primarily holds that a careful weighing of competing interests is required to determine whether the First Amendment rights of a teacher critical of the school system have been violated when the teacher is discharged. I do not think that it is the view of the Fifth Circuit that a weighing of interests is appropriate in determining a remedy once a constitutional violation has been established. *See* Sterzing v. Fort Bend Independent School Dist., *supra*.

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in Pred v. Board of Public Instruction, 415 F.2d 851, 856 (1969): "The right sought to be vindicated is not a contractual one . . . . What is at stake is the vindication of constitutional rights. . . ." The Fourth Circuit has concluded: "There was no lawful basis for the . . . discharges, and the plaintiffs are entitled to be restored to the positions they occupied when they attempted to assert their rights. . . .

Otherwise they would not be made whole, and similar discriminatory discharges would be encouraged." Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 (1966) (en banc), revg. 243 F.Supp. 403 (E.D. Va. 1965).

I would remand the case to the district court with instructions that the board be directed to reinstate Ms. Burton for a one-year period at the beginning of the next school year.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PEGGY BURTON, Plaintiff-Appellant, v. CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5, et al., Defendants-Appellees.	)	No. 73-1568 ORDER

Before: LUMBARD, MERRILL and WRIGHT, Circuit Judges.

The panel as constituted has voted to deny the petition for rehearing. Judges Merrill and Wright have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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The panel opinion filed on January 13, 1975 is withdrawn and an Amended Opinion, filed herewith, is substituted.

Filed: March 28, 1975
Docketed: March 31, 1975

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PEGGY BURTON, Plaintiff, vs. CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5, Defendants.	)	Civil No. 72-334 OPINION January 18, 1973

Jere M. Webb; Charles F. Hinkle,
c/o ACLU of Oregon, Inc.,
900 S. W. Fifth Avenue,
Portland, Ore. 97204,

Clemens E. Ady,
210 Pacific Building,
Salem, Oregon 97301,

Attorneys for Plaintiff.

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Robert W. DeArmond,
687 Court Street, N. E.,
Salem, Oregon 97301,

Attorney for Defendants.

SOLOMON, Judge:

Plaintiff was dismissed from her teaching position at Cascade High School because she is a homosexual. She seeks relief under 42 U.S.C. § 1983. The case is before me on her motion for summary judgment.

Plaintiff began to teach in the Cascade High School on July 1, 1970. She was a full-time teacher during the 1970-1971 school year. In October, 1971, after she commenced her second year of teaching, the principal of the High School learned that plaintiff was a homosexual from the mother of a student. There is no allegation that plaintiff was derelict in her teaching duties or that she made any homosexual advances toward any student. After she acknowledged that she was a "practicing homosexual," the Cascade School Board terminated her teaching contract pursuant to ORS 342.530(1)(b), which provides:

> Dismissal of teachers. (1) During the period of the contract . . . the district school board shall dismiss teachers only for:
>
> . . . .
> (b) Immorality;
> . . . .

I find this statute unconstitutionally vague. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926); Cramp v. Bd. of Public Instruction, 368 U.S. 278 (1961).

This statute vests in the school board the power to dismiss teachers for immorality. However, the statute does not define immorality. Immorality means different things to different people, and its definition depends on the idiosyncracies of the individual school board members. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatory enforcement is inherent in such a statute. See United States v. Reese, 92

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U.S. 214 (1875). ("It would certainly be dangerous if the legislature could set a net large enough to catch all offenders, and leave it to the courts to step inside and say who would be rightfully detained and who should be set at large." Id. at 221.)

A statute so broad makes those charged with its enforcement the arbiters of morality for the entire community. In doing so, it subjects the livelihood of every teacher in the state to the irrationality and irregularity of such judgments. The statute is vague because it fails to give fair warning of what conduct is prohibited and because it permits erratic and prejudiced exercises of authority.[1] See Amsterdam, The Void for Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960). No amount of statutory construction can overcome the deficiencies of this statute.

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1. ORS 342.530(1)(b) also presents serious constitutional problems because it does not require a nexus between conduct and teaching performance. Mindel v. U. S. Civil Service Commission, 312 F. Supp. 485 (N.D. Cal. 1970).

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Counsel are directed to meet within the next 14 days and agree, if they can, on an appropriate remedy. If counsel fail to agree on a remedy, the Court will hold a hearing to resolve this issue.

Dated this 18th day of January, 1973.

/s/ Gus J. Solomon
United States District Judge

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Partial Transcript of Proceedings in District Court Re Relief to be Granted, February 1, 1973

THE COURT: What is it you want?

MR. HINKLE: We seek reinstatement, Your Honor, mainly, with back pay. Those are the two chief elements of our request. *** Peggy Burton's concern is that she be reinstated and be given a chance to go back.

THE COURT: I am not going to reinstate her. This is not the case for reinstatement. I am willing to give her back pay and attorney's fees. It just wouldn't work out to reinstate this woman in this little area. I am not going to do it. So, if you can get together on the amount, fine; if not, I will set the amount.

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PEGGY BURTON, Plaintiff, v. CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5, Defendants.	)	Civil No. 72-334 JUDGMENT ORDER

This Court having heretofore found that Oregon Revised Statute 342.530(1)(b) was unconstitutional because of its vagueness and directed counsel for the respective parties to attempt to agree on an appropriate remedy, and the Court being advised that such an agreement could not be reached, a hearing was held and the

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Court finds that plaintiff was dismissed by the School Board under an unconstitutional statute and, therefore, her dismissal was invalid.

IT IS ORDERED that the defendant school board shall pay to plaintiff the balance of her salary for the teaching year 1971-72 in the amount of $6,180.56, and 50% of her salary for the teaching year 1972-73, to-wit: $3,592.50, for a total of $9,773.06 as damages.

IT IS FURTHER ORDERED that plaintiff shall not be reinstated to her teaching position in defendant Cascade Union High School District.

IT IS FURTHER ORDERED that the defendant Cascade Union High School District, through its board of directors, shall expunge from its records that portion of the meeting relative to the dismissal of plaintiff, and shall expunge all references to plaintiff's dismissal from her personnel file.

IT IS FURTHER ORDERED that the defendant school district shall pay to

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plaintiff on account of her attorney fees and costs the sum of $750.00.

Dated this 2nd day of March, 1973.

/s/ Gus J. Solomon
Senior United States District Judge

Filed: March 6, 1973.

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SUPREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1626

PEGGY BURTON,

Petitioner,

vs.

CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5,

Respondents.

RESPONSE TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W. DeARMOND
of DeArmond, Sherman & Bryan
687 Court N.E., P.O. Box 2247
Salem, Oregon 97308
Attorneys for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1626

PEGGY BURTON,

Petitioner,

vs.

CASCADE SCHOOL DISTRICT UNION HIGH SCHOOL NO. 5; LEONARD FEDERICO, individually and as principal of Cascade Union High School No. 5; FRED ARCHER, individually and as Superintendent of Cascade School District Union High School No. 5; LeROY McGILL, ERVIN KREJER, HERMAN HENRIKSON, MERLE CRANE and CLARENCE GOFFIN, individually and as Board of Cascade School District Union High School No. 5,

Respondents.

RESPONSE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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The matter of the reinstatement of Petitioner as a non-tenured teacher in Cascade School District Union High School No. 5 was fully and carefully considered by the Honorable Gus Solomon, Senior Judge of the United States District Court for the District of Oregon.

The matter was again carefully considered by the United States Court of Appeals Judges for the Ninth Circuit; and, in both instances the matter of Petitioner's reinstatement was denied.

As appears from the record, the communities encompassed in the boundaries of the District are all rural and small in size with a purely agricultural atmosphere.

In view of this situation, the Honorable Judge Solomon felt that this was not the type of case that warranted

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reinstatement; and, therefore, awarded Petitioner her full salary together with one-half of the salary for the next year.

Under Oregon law Petitioner, as a non-tenured teacher, could not necessarily expect that her contract with the District would be renewed for the following year. See, Oregon Revised Statutes 342.513:

> "**Renewal or nonrenewal of contracts for following year.**
>
> (1) Each district school board shall give written notice by March 15 of each year to all teachers and administrators in its employ who are not under tenure or who are not eligible for a three-year contract under ORS 342.508 the renewal or nonrenewal of the contract for the following school year."

Respondents contend that although the Courts do have a right of reinstatement without question, that this is an extra-ordinary remedy; and, generally re-instatement involves situations of racial discrimination and where there

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apparently have been reprisals against a teacher for the legal exercise of the right of free expression. And, in all of the cases, all of the facts and circumstances should be fully considered. See, Franklin vs. County School Board, 360 Fed. 2d 325 (4th Cir. 1966); Pred vs. Board of Public Instruction, 415 Fed. 2d 851, 856, 859 (5th Cir. 1969); Stewart vs. Pearce, 484 Fed. 2d 1030 (9th Cir. 1973).

The Respondents submit that the facts and circumstances in this case do not warrant reinstatement of Petitioner as a teacher in their small District.

In this case the Board did not act maliciously, but acted under a Statute of the State of Oregon which had been in effect for more than twenty-five years which provided that a teacher may be dismissed for immorality. This

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Statute was held unconstitutional as being too vague by Judge Solomon; but the decision was made subsequent to the action by the School Board, and therefore it does not appear there would be any maliciousness or arbitrary action on the part of the Board in dismissing Petitioner.

Prior to her dismissal, Petitioner was granted a full hearing before the Board, and at the hearing were parents of children in the District and members of the staff as well as the full membership of the Board.

The matter of her deprivation of property in connection with the question of reinstatement has to be looked at in connection with the Order of the Honorable Judge Solomon in which the record of Petitioner's dismissal was expunged and is therefore not a matter

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of public record as far as the school records are concerned.

In view of all the circumstances in this case together with the fact that the Petitioner has been awarded compensatory damages, Respondents respectfully submit that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

DeARMOND, SHERMAN & BRYAN

by

Robert W. DeArmond
of attorneys for
Respondents

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